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WHAT SHALL WE DO WITH STARE DECISIS?
ROSS ESSAY CONTEST

ORGANIZING THE BAR FOR PUBLIC SERVICE
EDITORIAL

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EVAN HAYNES ON SELECTION OF JUDGES
A NEW BOOK

AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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What Shall We Do with Stare Decisis?

THREE ALTERNATIVES present themselves in considering the answer to this question. We may make every judge a law unto himself and every case a case of first instance. We may compress the combined precedents of all the courts through the years into a code such as the American Law Institute Restatement and give it the force of law. Finally, we may adhere to the common-law principle of making every decision a final statement of the law on that subject for that jurisdiction. The first alternative is suitable only for primitive society. The second may be the most advanced of the three, but if so, our country is not yet ready for it. We are going to get along with the third for some time to come.

If that is true, we must establish it on a basis that is reasonably satisfactory and serviceable. Its simplest form—inflexible and uniform application of the principle of *stare decisis* to all decisions—can only be satisfactory in the jurisdiction of a court that never makes a mistake. But all courts make mistakes. If they are permitted unlimited discretion in correcting their mistakes as often as they like we are actually back to the first alternative. Some middle ground must be found, some viewpoint with respect to *stare decisis*, some rule governing its application, that will preserve its salutary effect as a stabilizing influence on the law and yet prevent it from perpetuating the occasional errors of the judges. That viewpoint or rule must then be widely publicized among lawyers and judges, advocated in lawyers' briefs, and otherwise propagated until it establishes itself as a part of our judicial process.

The 1945 Ross essay contest of the American Bar Association offers real hope that progress toward the solution of this problem, both in thinking it out and in presenting it for action, will be made. A three thousand dollar prize is offered for the best essay on the development of the doctrine of *stare decisis* and the extent to which it should be applied. It is to be hoped that many lawyers and judges will enter the contest, and that wide publicity will be given not only to the one winning essay but to the excellent runners-up sure to be produced by such an attractive contest on such a stimulating subject.

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Organizing the Bar for Public Service

AN ARTICLE BY a labor leader in a Kansas newspaper remarked that the state bar association had gone on record as favoring the "closed shop" for Kansas lawyers, and went on to explain that the integrated bar was in reality a closed shop. It is not to be wondered at that a labor union man should thus regard an inclusive bar organization. Although one cannot make a living in the law without working, lawyers are not laborers in the labor union sense of the word, and union men have no occasion for familiarity with the legal profession any more than the rest of the public.

The fact that some lawyers themselves have been using labor union terminology in discussions of the integrated bar, and that opponents of integration have sought to attach to bar integration some of the disapproval which part of the public feels toward closed shop union practices justifies an inquiry into the validity of the attempted analogy.

A closed shop is an employment group, all of the workers of which are members of a certain labor union, and to which no worker can be admitted unless he is a member of that union. An example would be a shoe factory in which all workers are members of the boot and shoe workers' union, and where only members of that union are eligible to apply for jobs. The union is an organization of workers either in a common trade or occupation or working in the same industry or plant. Their reason for organizing is to be able to demand and obtain through the force of numbers higher wages, shorter hours, better working conditions, and other things to improve their condition. Their ability to enforce such demands is seriously hampered if other workers are willing to accept employment on less favorable terms, and so they are naturally anxious to eliminate such competition wherever possible, by means of the closed shop. A few of the unions have elevated standards of workmanship and otherwise contributed to the general public welfare, but such effects are incidental and subordinate to the chief objective of getting more from the employer than the workers can get through individual action.

The lawyers of a state are more than a group of people making a living by the same occupation. They are an essential part of the government. They are officers of the courts, engaged in performing a public service as vital to the people of a commonwealth as police, public health, or any other governmental service.

The administration of justice is a fundamental responsibility of government. Along with the keeping of the peace, with which it is closely associated, it is probably government's first and foremost job. Anarchy and disorder lie in the wake of a retreating army; the first task of the occupying forces on their arrival is to establish order, for the doing of which some system of justice, first criminal and then civil, is required.

Primitive justice requires only a judge, before whom parties plead their own causes. In fact, the intervention of an advocate has often been frowned upon. The early settlers of America were determined to have no lawyers, and even today parties appearing before some administrative agencies are warned that no lawyer is necessary and it is frequently implied that the retaining of one will be looked upon with disfavor. A legal profession grew up in colonial America, however, and lawyers today practice before administrative boards, and no matter what steps are taken to the contrary lawyers will always be a part of any orderly system of administering justice.

LAWYER SERVES BOTH CLIENT AND COURT

The reason is that the services of the lawyer are something that neither the litigant nor the judge can get along without. The preparation of a case for trial, assembling of the witnesses, development of the argument, and other things the lawyer does for the client are things the client might conceivably do for himself, but they are things that most clients are too busy to care to do. Printers might manufacture ink if they wanted to, but most of them are content to buy their ink and devote their own energies to the printing business. Not only are they thus able to do a better job of printing, but they probably get better ink. Similarly, they might take their own cases to court,

but if they did they would sometimes have little time left for printing, and they would probably lose to adversaries whose cases were prepared by the specialists in that field—the lawyers.

If all judges were of infinite wisdom and capacity they might be able to hold court without lawyers, but they are not. The volume of cases is so heavy and the search for the law so complex that they simply do not have the time to ferret out the correct rule for each situation that is presented. Under our system they do not have to. The view of the law most favorable to each party is presented by men who themselves know how to search for the law, and the job of the judge is reduced to that of comparing the two arguments, verifying their authorities, and making a decision between them.

Since the lawyer's service is essential to the vital governmental function of administration of justice, he has an obligation to the government as well as to his clients in the performance of it. If a shoemaker makes a poor pair of shoes and his customer is willing to accept them, it is nobody's business but their own. If a lawyer, on the other hand, handles the defense of a criminal case so poorly that an innocent man is sent to prison, not only the client suffers, but the public also in being compelled to support a man who should be supporting himself.

It is the dual nature of the lawyer's work, partly private like that of the butcher, baker and candlestick maker, and partly as an officer of the government like the policeman, that confuses some people's thinking. So far as it is private, he needs organization only as much as the labor union men do, and for the same reasons. So far as he is a public officer he needs organization just as much as other public officers do, and for similar reasons. However, since he fills both functions through the very same acts it is a question of having them both either unorganized or organized.

ADMISSION REQUIREMENTS ARE EXCLUSIVE

This is not to say that without the integrated bar the activities of the lawyers are entirely outside of governmental supervision. There have been times when practically anybody who cared to could practice law, but happily that is now a thing of the past in this country. Before a young man can appear before the American courts as a lawyer he must satisfy an examining board that he has sufficient educational attainments and sufficient knowledge of the law and facility in working with it to justify a client in entrusting a case to him and a judge in accepting his assistance in solving it. He has to furnish evidence of character worthy of such a position of trust, and if his subsequent conduct does not measure up to that high standard he is at any time thereafter subject to disbarment, or expulsion from the group. If a legal parallel for the closed shop be desired, here it is—in full force and operation in every state, territory and country where courts and lawyers function, and accepted as a necessity by everybody.

The question of integrating the bar is just a question of making this arrangement effective instead of ineffective. Although an unruly lawyer is everywhere subject to disbarment, only in those places where the bar is properly organized, aware of its responsibilities and determined as a group to live up to them is he fairly certain of being taken to task for his misdeeds. Something along this line can be done by active, interested voluntary bar associations, but the outstanding records of the integrated bars in state after state show clearly that the sensible way is to give the lawyers an organization that can speak for them as a whole and let them exercise through it the self-control and self-government that decent people always prefer to outside restraint.

Not only in the negative sense of enforcing discipline, but in the positive sense of taking the lead in constructive movements to improve the administration of justice and the legal profession, the integrated bar is the tool the lawyers need for effective action. But this article is not a general brief for the integrated bar and will pursue those arguments no further. Instead, we will close by reemphasizing that the true "closed shop" of the law is not the integrated bar but the system that limits the practice of law to persons who have shown their intellectual and moral fitness for it, and that integration is merely the minimum organization needed to enable such persons to carry out their high responsibilities in the government's biggest job—the administration of justice.

"Trade Barriers" to Bar Admissions

H. CLAUDE HORACK

"Though each state determines who should become members of its bar, such barriers as are set up for admission should be those attempting to secure competency, rather than exclusionary with the purpose or effect of reducing competition for the local lawyer."

IN RECENT YEARS much attention has been directed to trade barriers which have been erected to protect local business activities from outside competition. The profit motive has generally been the underlying cause of such restrictions in order to give advantage to local business. Lawyers and physicians have always insisted that theirs was a profession and not a trade or business and should be conducted on a different basis. Yet, an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers.

These restrictions do not state this as their purpose and it is probably true that in many and perhaps most cases objectives of a much higher nature were originally responsible for the restrictions which are found in a majority of the states. However, they should be viewed as to their actual present-day effect rather than the motive which first suggested their adoption. Is their tendency to improve the profession, or to secure special privileges to a local group? It should be borne in mind that "the licensed monopolies which professions enjoy constitute, in themselves, severe restraints upon competition. But they are restraints which depend upon capacity and training, not special privilege." *United States v. American Medical Association*, 130 Fed. 2d. 233 at p. 246. In so far as the restraints imposed do not depend on capacity and training nor insure proper character investigation, they serve to protect local interests from competition, rather than to secure a better quality of legal service. As such they are not justified from a public and professional standpoint and for the good of the profession should be done away with as "trade barriers" which tend to protect and keep in "business" those who cannot stand professional competition. These barriers affect two groups, lawyers who wish to move to another state, and law students seeking admission to practice.

Many of the provisions are of long standing but have recently been more rigidly enforced since many members of the bar have felt the effects of economic pressure, due in part to the depression of the early thirties, but probably more because of the diminution of business resulting from the failure of many lawyers to keep abreast of the more recent developments in the law, particularly in such fields as taxation, labor law and various branches of administrative law.

EXCLUDING THE CROOKED LAWYER

The migrant attorney, shifting from one state to another, has no doubt brought about many of the restrictive provisions originally intended for the protection of the bar. In earlier years it was not unusual for grievance committees to give to an attorney, accused of unethical conduct, a choice of leaving the state or being subject to a full investigation with a possible recommendation for disbarment proceedings. Such an attorney, whose misdeeds had caught up with him, was likely to go to a state where he was not known to begin his unethical career all over again. Lax provisions as to admission on comity made this easy and in some states the problems thus brought about were acute. I remember hearing, some years ago, the chairman of a grievance committee reply, when asked what action had been taken with reference to an attorney against whom complaints had been made, "We gave him a trip to California." California, however, instead of making exclusionary rules for admission of attorneys from other states, met this situation by provisions for careful examinations of all such applicants combined with full inquiry as to the lawyer's antecedents and reputation. It has been the administration of their rule rather than the rule itself that has resulted in a great decrease in the number of

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comity applicants and the admission only of those who will raise, rather than lower, the quality of the bar.

Most states have some comity provisions permitting an attorney who has practiced a number of years in another state to be admitted on motion, but provisions as to residence or citizenship prior to admission usually operate to exclude the good lawyer, leaving the door wide open for the down-and-out practitioner of another state. If a lawyer must be a resident for one year or more prior to applying for comity admission, it is quite clear that unless he has a substantial income outside of his practice, he cannot abandon his office and settle down for a year in idleness in order to establish such a residence. On the other hand, the attorney who does not have a sufficient practice on which to live can come into the state, get a job of a non-legal nature and thus fulfill the residence requirement for comity admission. For him the requirements are not exclusionary and there is nothing to prevent the bar of the state from being filled up with lawyers whose abilities have not assured them a living elsewhere from their profession. In other words, the residence restriction has worked only to exclude the lawyers of better quality while in itself it is in no way a barrier to the one who has already proven himself professionally incompetent and a failure in another state.

Of course the reason given for a period of residence prior to admission is that it will thus prevent an unknown lawyer of bad moral or professional character from gaining admission, because during this period he will have an opportunity to establish his good moral character where he will be under the observation of local people. Practically this is of little or no protection to the state and the bar. A mere year of residence does not go far to establish a man's character and only careful investigation at the applicant's former place of residence is apt to disclose those habits or qualities which would make him an undesirable member of the local bar.

RECIPROCAL COMITY PROVISIONS

Another peculiar but frequently found comity provision—a very human one but one which does not tend to assure quality—is the provision that a lawyer from state A will not be admitted on comity in state B unless state A would extend like courtesies to the lawyers of state B. Such a provision has no doubt satisfied local pride but does not tend to secure professional competence. Thus, if state B only requires a high school education and two years of night law school for admission to the bar, the effect of the provision is to prevent comity admission to any lawyer who comes from a state insisting on higher educational qualifications. A lawyer from a state that has fixed high standards to insure competence is in effect barred by that fact.

The difficulty of securing adequate information concerning the migrant attorney has induced the American Bar to establish a service for the investigation of comity applicants. After such an inquiry and examination of his record there is apt to be little of a lawyer's shady past history that is not brought to light. This investigation is not limited to the immediate place of the applicant's residence, but his previous activities are traced, wherever they may have taken him. With such opportunity for securing information, it would work for a better quality of the bar if, instead of requiring residence with attendant idleness or separation from practice, it were only required that sufficient notice be given of the desire to become a member of a certain bar and pay such fee as is required to permit a thorough investigation. An organization such as the American Bar Association, with its personnel and its broad contacts, is in position to make an investigation such as few, if any, local bar associations could attempt, leaving it to them to require such further examination as they may think necessary or desirable. The Federal Bureau of Investigation could hardly do a better job than is now done in the reports made by this organization when called on for information on lawyers seeking to become members of the bar of another state.

PROBLEMS OF THE LAW SCHOOL GRADUATE

As to students, the main hurdles to admission which are exclusionary in effect are provisions for residence as a prerequisite to taking the bar examinations and unnecessarily severe requirements as to registration. It is strange to find states requiring an applicant to be a resident and a citizen for a substantial length of time but allowing graduates of local schools to be admitted "on diploma" on the assumption

that they are of good character unless the contrary is definitely shown. No state that is interested in the quality of its bar should grant admission to one who does not have the courage to submit himself to a sound bar examination test. It is characteristic of a school having the "diploma privilege" that its curriculum and methods of teaching have seen little if any change during the past quarter of a century, although during that time the members of the profession have been required to adjust themselves to radically changed conditions of practice if they were to survive.

The theoretical justification for rules as to residence or citizenship is that it gives the examiners and the public of the state in which admission is sought an opportunity to become familiar with the candidate and informed as to his moral character. Such restrictions are subject to less criticism where a real attempt is made to secure information which such residence in the state may afford, but the states following this practice are few indeed. True, if a student should be convicted of a serious crime during his period of residence it is likely that this fact might come to the attention of the examiners but it is not likely that they will have any information bearing on his conduct before coming into the state. As a protection to the profession, it seems to contemplate a state composed of small communities in which each individual's personal affairs are known and talked about by the rest of the community. If a real knowledge of the candidate is desired, mere residence does not provide it, and unless the student has been engaged in some disgraceful affair that has given him great notoriety, it is not apt to be brought to the knowledge of the bar examiners. Usually a statement as to "good moral character" given by two or three local residents is all that is required, and these are often furnished without any feeling of responsibility to the profession.

A provision for the registration of law students has been adopted in a number of states with the time set for such registration varying from some months before the beginning of law study to within a few weeks of the bar examination. In theory, this calls to the attention of the examiners those who intend to apply for admission and gives them opportunity to observe them during the full period of such registration. But is this in fact being done? It takes a well organized and efficient board of bar examiners, with a permanent office force and considerable funds at its disposal, (as in New York and Pennsylvania) to operate such a plan so as to make it even fairly effective in the elimination of unworthy candidates.

MUST HE GO THROUGH LAW SCHOOL AGAIN?

What then is the effect of the restrictions as to residence or registration? In many cases the registration provisions are almost an absolute barrier to a young man who seeks admission unless he has decided long before he is ready to practice that he desires to make his professional career in a particular state. Add to this the requirements of residence,—as much as 18 months in one jurisdiction,—and the difficulties of making a free choice of school and location are almost insuperable. The solution suggested by one bar examiner shows the extent to which such restrictions may be, from a practical standpoint, an absolute barrier. In this case the young man, a resident of state A, after securing his legal education at a nationally known law school in state B, was offered a desirable opportunity to become connected with a good law firm in state C. He was willing to abide by the results of a bar examination or any character examination given by the state but he found that he was not eligible to take them, both because he had not registered at the beginning of his period of law study and because he had not been a resident of the state for the required period. The happy solution suggested by an official of the board of bar examiners was that he should now register, establish a residence, and begin the study of law all over again! The fact that he only had one life to live and already had a good legal education did not enter into the solution of his problem.

Is it short-sighted or unreasonable or undesirable for a young man to attend that law school where he believes he can secure the best possible legal education? Over one hundred approved law schools grant to their graduates the privilege of putting after their names certain letters to signify they have completed the course of study which the school offers. Yet, the difference in the quality of these schools and the type of education which they offer may be the difference between a knife made of cast

iron and one made of the finest steel. Some schools offer no courses in taxation, labor law, or other administrative law subjects although a large proportion of present day practice deals with such matters. In others, though courses are offered under these titles, they are given by instructors having no adequate background for their presentation. The fact that the young man asserts such discrimination at the beginning of his law study as to pick a school which applies high standards of admission and performance to its students and that offers instruction in the subjects of present day importance by men who are experts in their fields would point to his becoming a desirable member of the bar of any state. This seems of more vital interest to the profession than the mere fact that the student had filled in a blank at or before the time he decided to study law, or has resided in the state for a given length of time without being convicted of a crime or being proved to have engaged in immoral conduct. Particularly is this so if there are convenient methods provided by which the bar examiners may ascertain and have available for consideration all pertinent facts concerning him.

Will it raise the standards of the bar if the young man, a resident of another state and a graduate of an out-of-state law school, is required to wait for a year or perhaps almost two years, if he happens to come into the state just subsequent to the first available examination, and live by his wits or work in a filling station until he has fulfilled this time requirement? If he has no independent means, such a retriction may, as a practical matter, be an absolute barrier to his ever becoming a member of the bar in that state. If he should work in a filling station for a year or more while forgetting a great deal that he has learned in law school, will he be a better potential member of the profession? Will they be more certain at the end of this time that he is of the quality which they desire than if he had been allowed to take the examinations immediately upon graduation from his law school and at once begin his professional career?

BETTER METHODS OF INVESTIGATION

If the protection of the profession requires a knowledge of the man in his local setting, would it not be better to admit him provisionally and make an investigation after he has been connected with the profession for a reasonable length of time and there has been an opportunity for members of the bar to become acquainted with and observe him? Or, if that is undesirable, to allow him to take the examination and withhold his license for such time as is necessary to investigate him.

But there is another way in which the bar can more adequately protect itself. Here, as in the case of the migrant attorney, the bar can be much more adequately protected by asking the American Bar Association to make an investigation of the student not only at his school but at his home, or if the local bar has its own machinery for such investigation to apply it to the student as well as to the migrant attorney. It is likely that the American Bar would undertake this service at a much lower charge for students than for lawyers. But whether it would or not, it would still be worth while for the student to pay the fee whatever it might be rather than to have denied to him the opportunity to start at once in the place where he wishes to establish himself professionally.

Provisions for registration of law students have been found to be of some value to prevent applications being made for the bar examinations by persons who have not spent the required length of time in law study or whose period of study might be certified to by some irresponsible lawyer or law school. But registration should be more than a matter of form and the payment of a fee. To be effective it should be combined with some check of the student's conduct, his course of study and his diligence in pursuing it. With the aid of such an organization as the American Bar Association, a reasonable comity provision applicable to student registration would not only accomplish the purposes for which local registration is required but would prevent the hardship upon an applicant for the bar examinations who is now often prevented from taking the examinations because at the time of or before the beginning of law study he had not decided upon the state in which at the time of graduation he desires to locate. The investigations might be limited only to those attending schools

approved by the American Bar Association, for here the opportunity for careful check of the student would be quite complete since such a school is under the supervision of the American Bar Association, responsible to it, and subject to its inspection as to its standards and quality of work.

Though each state determines who should become members of its bar, such barriers as are set up for admission should be those attempting to secure competency, rather than exclusionary with the purpose or effect of reducing competition for the local lawyer. He needs to be stimulated by higher professional standards and a higher quality of membership rather than to be protected by rules which in effect hold for those of poor ability or inadequate training, already members of the fraternity, such business as they are in position to handle. That the public has an interest surely does not need to be argued.

It cannot be said that the bar in general has deliberately sought to establish trade barriers for the profession yet they are present in many states while the bar looks on,—or fails to look,—with the result that low standards of professional competence are tolerated to the very great detriment of the lawyer in public estimation.

That a great advancement has been made in the last twenty-five years, no one can question. Nor can anyone doubt that there is still left a great field for improvement. No longer can any state afford to seek to protect the present members of the profession by barriers which are not based on professional competence or to bar men from entering the practice merely because it is too much trouble to investigate them. The barriers such as residence and registration have grown up gradually and though perhaps at the beginning had no deliberate intention to place a bar to competency or freedom of choice of location, now, because of changes in viewpoint and conditions, are being used in some states with the deliberate intention of preventing entrance into the profession with the resultant protection of the lower portion of the bar that has not kept up with the changes and advancements which produce the type of lawyer that the public has reason to demand,—a bar prepared to handle the many new types of legal business with which the present-day public is concerned.

Lay Notaries Should Be Abolished

The Lawyers Club of Los Angeles, according to a note in the North Dakota State Bar Association's *Bar Briefs*, is advocating the abolition of the office of notary public and the use of acknowledgments, and is proposing instead that documents now notarized be witnessed by two witnesses. *Bar Briefs* finds merit in the proposal, provided there is an adequate penalty for false witnessing. "North Dakota is blessed with notaries on every corner who will stamp that official seal on anything presented, fill out any sort of blank in any sort of way, to the detriment of the unsuspecting public. Why not have legislation making every lawyer, by virtue of his license, an officer authorized to do the job of a notary?"

27 Cents a Year for Courts

The average per capita cost of the American courts in 1939 was 27.042 cents, of which 4.816 cents was for supreme courts and 22.226 cents for other courts. Per capita cost of supreme courts went as high as 40.585 cents in Nevada and as low as 1.516 in Texas, while for the other courts the extremes were $1.01649 in Vermont and 4.785 cents in Delaware.

The 309 supreme court judges in the United States drew an average salary of $9,280.93. The highest were—and still are—$22,000 in New York, while the highest judges of South Dakota receive only $4,800 a year. Four states, Idaho, Kentucky, North Dakota and Utah, pay only $5,000 a year. Salaries of trial judges ranged from as low as $3,000 a year in Arizona to as high as $25,000 for New York City judges of the Supreme Court of New York, a trial court.

Salaries of federal judges range from $7,500 in certain territorial courts to $20,000 for the justices of the Supreme Court. The more than 150 federal district judges are paid $10,000 a year.

From three- to four-fifths of all Texas cases are now settled or simplified through pre-trial procedure.—*Texas Bar Journal.*

Consensus of Judicial Selection Proposals*

GLENN R. WINTERS†

IN THE ACCOMPANYING tables are shown the structural details of about fifty judicial selection plans advanced in this country during the past thirty years. This does not purport to be a complete list, especially as to sponsors, many of whom have submitted identical plans independently of each other. Enough of them are included to show the trend of professional thinking during that time, and it is believed that no important proposals have been omitted.

NOMINATIONS

A glance down the second column of the table will show how widely the idea of an advisory nominating board to serve prior to appointment or election has taken hold. Only eleven of the plans do not involve use of such a board.

The number of members ranges from three to eleven. Nothing would be gained by having more than that, and it is probable that those consisting of five and seven members would be most satisfactory. Table II shows the make-up of a score of such proposed commissions. Their membership includes, for the judiciary, chief justices and associate justices of trial, intermediate appellate and supreme courts; for the bar, presidents of state and local bar associations, state bar governing boards, and practitioners. Political members include governor, attorney-general, state senators and representatives, and chairmen of legislative judiciary committees. Also included are deans of law schools and laymen.

The purpose of the nominating commission is not only to keep the appointing officer from making bad selections, but to give him affirmative assistance in making good ones. To that end, the personnel of the commission should be such as to bring in the maximum breadth of experience and viewpoint. Alonzo Wasson, Dallas newspaperman, has contributed much to the Texas Civil Judicial Council, and so has Stuart H. Perry, publisher of the Adrian *Telegram*, to the Michigan Judicial Council. Newspapermen possess an acquaintance with the characteristics and qualifications of men in public life matched by no other class of people. Why not take advantage of that by putting a representative of the press on the nominating commission? Other possibilities worthy of consideration include the clergy and representatives of organized labor and agriculture.

A good selection for a nominating commission would be the Missouri method, three lawyers and three laymen, plus two or three *ex officio* members, presided over by the chief justice of the state's highest court for selections to that body, and the presiding justice of the appropriate intermediate appellate tribunal, if any, for lower court appointments.

The list to be submitted by the nominating commission is usually to contain three or five names. Not all of these suggestions can always be of uniform merit. No doubt many times a member of the commission, on inquiry, would say, "Certainly, we know that Mr. X would not be as good as A or B, but we had to furnish three names, and he was as good as we could find for the third name." Why not provide for the commission to furnish, along with the names, its collective opinion as to their relative excellence? This would be very helpful to the appointing officer, even though not binding on him, and it would require no extra effort on the part of the commission.

Someone has proposed that if the appointing officer finds no satisfactory name on the list he should be allowed to make a counter nomination to the commission. Several allow the rejection of the entire first list but compel a nomination from either the first or second.

APPOINTING OFFICER

The great majority of the plans vest the appointing power in the governor. Some of them put it in the chief justice of the supreme court who is himself elected by the people (or, as

*Revised and adapted from Chapter VI of *Selection of Judges in New York and in Other States*, by Glenn R. Winters, published by the Lawyers' Committee on Selection of Judges, First Judicial District, New York, 1944. Used by permission.

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suggested by Dean McCormick, appointed by the governor) and a few entrust it to majority vote of the nominating commission. The Chicago Bar Association proposes appointment of municipal judges by the mayor, and New York City magistrates are already appointed in that manner.

As between governor and chief justice, there stands the argument of Albert Kales, based on short ballot principles, that the nominating power should reside in the person who bears the responsibility of getting the job done. Why should not the chief justice have the choice of his colleagues in the judiciary? The responsibility of the governor for the administration of justice is remote, indirect, and subordinate to his legislative program and his struggle to keep his party in power. Especially in a state where the judicial organization is wholly or partially integrated and the supreme court possesses administrative powers, the chief justice is a more logical person to wield the appointing power than the governor.

The ideal must be tempered with the practical. Granting the foregoing arguments, some compromise with politics may be justified for the sake of getting the plan accepted at all, and one of the most harmless sacrifices is probably to give the appointing power to the governor.

CONFIRMATIONS

With but two exceptions these have been done away with in the plans that include a nominating commission. Only the Commonwealth Club plan of California provides for neither nomination nor confirmation. The confirmation procedure seems to be largely a gesture if the work of the nominating commission has been of any value, and if not it should be remedied or abolished.

There is one argument for retaining both. The judicial department, unlike the legislative and executive, has no affirmative power of its own. Technically it can only *decide*, and must depend on the rest of the government for its very life. The great problem has been how to provide it with that life in such a way that it will still be independent of the other departments in its decisions. Offhand, it would seem that selection of judges by either one of the other departments alone would have a tendency to magnify the influence of that department on the judiciary. Participation by both in the selection process should help to maintain a balance of influence, and appointment by the governor and confirmation by the senate should accomplish this purpose. Whether or not that argument is offset by other considerations is a matter of opinion.

TENURE

Although tenure subject to periodic vote of the people is very popular with the planners, there may be some argument on principle against it. Once a good judge has been put on the bench, he ought to be able to keep his seat indefinitely until death, retirement or resignation. The vote on retention in office is intended and expected hardly ever to interfere with the operation of that rule.

If there were some way of protecting the tenure of good judges but dropping out the worthless, incompetent and dishonest ones, it would surely be an improvement over a system of keeping the bad in order to avoid losing the good. It remains to be proven whether the voters can exercise any better judgment on the issue of reelection than on original election. There are certain factors in their favor. Without competitors on the ballot the air will be free of ballyhoo and conflicting claims and false issues. Lack of false issues, however, is no substitute for ability to pass judgment on the real one, which in this case is the judicial ability and fairness of the judge as shown in by his record during his term in office.

Although this is called "running against his record," the record is silent, with rare exceptions, except to those who have been involved in the judge's decisions and those who make an excursion to the law library. There surely are few people who believe that very many voters will go to the polls with more information about the average judge than as if they had had the job of selecting him in the first place.

It is the exceptional cases for which this provision was designed and which justify its existence. Jeffreys would have held no more bloody assizes after one vote of the people on the question of continuing him in office. His record would have been far from silent, and it would have defeated him. In the rare cases in this country in which a bad actor somehow gets on the bench, or, as is entirely possible, a good man goes wrong, this method is more practical and usable than the cumbersome mode of im-

peachment. As for the great majority of judges, it is to be presumed that, having no reason for dismissing them, enough electors will vote for their retention to keep them in office. Such has been the short experience of Missouri and the somewhat longer experience of California with the non-competitive vote.

George E. Brand of Detroit, who led an unsuccessful campaign for judicial selection reform in Michigan in 1938 declared afterward that although he had previously been opposed to the principle of "running on the record" he had become convinced that it was worth putting it in a plan for the sake of "relieving the minds of doubtful voters" and thus securing more votes than would otherwise be obtainable.[1]

PROPOSALS IN AID OF ELECTION

Practically all states have specified in detail in their constitutions how judges are to be chosen, and all of them have selected there the general method to be used. There is probably no state in the country in which a change from election to appointment of judges can take place without amendment of the constitution.

All constitutions are difficult to amend, and some, such as that of Illinois, are practically impossible. If an effort to amend the constitution has failed, or does not seem advisable, there are many suggestions for legislative action to improve the elective process, and others, such as bar plebiscites, which have no prerequisite except the decision to go ahead.

In 1937 Judge Edward R. Finch of the New York Court of Appeals proposed a Council on Judicial Character and Fitness, to investigate every candidate, the present judicial election system to remain otherwise unchanged.[2]

A former New York magistrate (Harry A. Gordon), in 1931 proposed a minimum requirement of experience at the bar for all judicial candidates and a written examination on the important branches of substantive and procedural law.[3] This is a novelty in this country, but not in Europe, where it is the normal procedure for all aspirants to the bench.[4]

A number of the plans in Table I propose to continue with popular election but to substitute the services of some official nominating agency for political party nominations and for the self-nomination of the non-partisan primary.[5] One would limit the vote to nominations of a bar primary; another to persons nominated by petition of the electors. Two would use a nominating commission, and one would add to the non-partisan ballot a provision that one of the candidates, presumably a good one if not the very best, would have the benefit of a notation, "Recommended by the Governor."

A plan radically different from anything else offered, which has won high praise from American Bar Association leaders, has been put forward by Mr. Charles H. Richards of Indianapolis. He proposes that candidacies be initiated by petition of members of the bar. Those who qualify are voted on in an official bar primary. The three getting the highest number of votes are put on the ballot for the regular primary, and the two getting the highest number of votes are the nominees for the regular election. This sifting process is intended to assure that judges elected merit the favor of both public and profession. Incumbent judges are protected in their tenure by putting their names automatically on the bar primary ballot unless they renounce the privilege. If the incumbent runs at least third in the bar's preference, he goes on the regular ballot, and if he stands no higher than fourth in the opinion of the bar, the chances are that he does not deserve to be reelected.[6]

"LAWYERS AS CHOOSERS OF JUDGES"

Three or four of the proposed plans call for the assistance of the bar in some part of the selective process. The 1932 Georgia plan, for example, calls for a bar primary, to select five men, from whom the governor must make his selection. The present California system has no nominating board at all, but Governor Earl

1. Brand, "Michigan State Bar's Work for Judicial Appointment," 22 J. Am. Jud. Soc. 199, at 202 (1939).
2. 20 A.B.A.J. 144 (1934).
3. 14 J. Am. Jud. Soc. 157 (1931).
4. See Morris Ploscowe, "The Career of Judges and Prosecutors in Continental Countries," 44 Yale L. J. 268 (1934); R. C. K. Ensor, *"Courts and Judges in France, Germany and England,"* (1933); Georges Picot, *Le Reforme Judiciaire en France* (1881).
5. Such a plan was approved by the State Bar of Michigan at its 1944 annual meeting. See 28 J. Am. Jud. Soc. 91 (Oct., 1944).
6. See report of the Special Committee on Judicial Selection and Tenure, 66 A. B. A. Rep. 305, at 308-9 (1941); report of same committee, 67 *Id.* 278, at 281-2 (1942); "New Proposals Facilitate Judicial Selection Reform," 24 J. Am. Jud. Soc. 119 (1940); "An Indiana Proposal Defended," 24 *Id.* 140-143 (1941).

Warren made this announcement at a recent meeting of the State Bar:

"I am extremely grateful to the State Bar for the assistance that it has given me in the past six months. You have helped me on every judicial appointment that I have made, and you have helped on every appointment that has been made in our selective service setup.

"I just want to say a word about the appointment of the judiciary. I am of the opinion that no man should aspire to the bench unless he can run the gauntlet of his own profession.

"Every man who is appointed in the next four years will have to do precisely that. If he cannot come through after an investigation by his own profession as being qualified for the bench he will not be appointed to any judicial position."[7]

Such an informal arrangement can be nothing but beneficial, but the 1934 Wisconsin plan went so much farther as to include in the nominating commission seven attorneys appointed by the board of governors of the state bar association. The 1938 committee of the same organization commented:

"A practical difficulty at once suggests itself, that the state bar association is a purely voluntary organization which quite clearly should not be given the status of a constitutional agency; . . . The constitution should not be made to set up machinery whose operation is vested in non-official individuals or bodies."[8]

Although this objection, if valid, would rule out all of the *ex officio* members of nominating committees, it is probably true that only in states where the bar is integrated should the organized bar be given any official duty in connection with selection of judges. Bar primaries, of course, take in all members of the bar and do not depend upon a bar organization.

Herbert Harley, former editor of the Journal of the American Judicature Society, has seriously questioned the wisdom of making lawyers choosers of judges. Granting that some members of the bar are competent to pass on the candidates' qualifications, he thought that ignorance, even in the bar, might be widespread in any large community, and worse, misinformation and prejudices that the public would not be likely to have. Harley further suggested that the preferences of many lawyers would be influenced more by the nature of the cases they try than by their notions of abstract judicial qualities; criminal defenders would want a softhearted judge, while another lawyer wants a staunch, arbitrary, technical-minded judge when he faces an opponent who has the emotional appeal on his side. Harley quotes another writer as saying that the bar gauntlet is one many lawyers refuse to run for the sake of a try at a judgeship.[9]

7. Earl Warren, "The Gauntlet of His Own Profession," 18 Calif. State Bar J. 222 (1943).

8. 28 Wis. State Bar Ass'n Proc. 56, at 60 (1938).

9. "Lawyers as Choosers of Judges," editorial, 19 J. Am. Jud. Soc. 116 (1935).

The traditions which have been built up in Massachusetts can be ascribed in part to our system of having the governor and his council select all our judges. Once on the bench for life, they have no voters to woo, no political leaders to please or placate, no obligations except to their profession, their conscience, the people and the Commonwealth. If dependent on the electorate for election and re-election, the sturdiest and most learned of judges are tempted to consider what the popular reaction will be when they write certain opinions. Intentionally or not, they become involved directly or indirectly in political disputes.—*Boston Herald.*

I was elected in 1916 because Woodrow Wilson kept us out of war. I was defeated in 1920 because Woodrow Wilson did not keep us out of war. In both of the elections not more than five per cent of the voters knew I was on the ticket.—*Fred L. Williams, former judge of the Supreme Court of Missouri.*

TABLE I

ANALYSIS OF PROPOSED JUDICIAL SELECTION PLANS

State	*Sponsor*	*Year*	*Nomination*	*Appointment or Election*	*Confirmation*	*Tenure*	*Remarks*
Calif.	Commonwealth Club			governor	.....	PNCE	15 JAJS 38
	State Bar	....	board*	governor	.....	PNCE	17 JAJS 8
	Adopted	1934	.....	governor	comm.*	PNCE	18 JAJS 102 (note 1)
Fla.	Dade Co. Bar Ass'n	1935	council*	governor (supreme ct)	.....	good behav.	18 JAJS 146
			.....	ch. justice (all other)	sup. ct.	"	
Ga.	Univ. Ga. Inst. Pub. Affairs	1932	bar primary	governor	legislature	PNCE	16 JAJS 41
Idaho	Judicial Council	1932	petitions of voters	election	.....	.....	16 JAJS 185
Ill.	Chicago Bar Ass'n	1936	commission*	mayor	.....	PNCE	63 ABARep 422 (note 2)
	Edward M. Martin	1936	commission	ch. justice	.....	PNCE	(note 3)
	1922 Const. Convention	1922	supreme ct.	governor	.....	PNCE	NY Ass'n of the Bar, 1932 p. 187
Ind.	Charles H Richards	1940	bar petition, bar primary, regular primary, and regular election				66 ABARep 308
Iowa	District Judges Ass'n	1937	commission*	not stated	.....	PNCE	63 ABARep 423
Ky.	State Bar Ass'n Com.	1937	ch. justice	governor	.....	PNCE	KySBAProc 1941. 150; 1942:118 (note 4)

Boards and commissions marked with an asterisk (*) are themselves analyzed in Table II following.

In the column headed "Tenure" the letters "PNCE" mean "periodic non-competitive election."

In the column headed "Remarks" citations are given, so far as possible, to more complete descriptions of the plans. For remarks not short enough for that limited space, reference is there made to the following series of notes:

1. Applies initially only to metropolitan courts, but may be extended to other counties of the state by local referendum.
2. Applies only to the Municipal Court of Chicago.
3. From Martin, *The Role of the Bar in Electing the Bench in Chicago*, p. 353 (1936).
4. Not adopted by the state bar association.
5. Applied to the supreme court only.
6. Supreme court justices to have good behavior tenure and others subject to periodic reappointment.
7. These plans were both submitted by the organization's board of directors. The 1915 plan was definitely not adopted by the Association, and the 1938 plan apparently was not.
8. This plan is applicable originally only to the metropolitan districts, but subject to adoption anywhere in the state by local referendum.
9. This plan is applicable only to city judges, but may be adopted elsewhere by local option. It was defeated in 1938 by popular vote.
10. This plan also requires ten years of practice for every judicial candidate. It was not adopted by the Association.

State	Sponsor	Year	Nomination	Appointment or Election	Confirmation	Tenure	Remarks
Md.	Bar Ass'n of Balt.	1939	petition	election	.....	not stated	64 ABARep 324
Mich.	State Bar Ass'n	1938	judiciary commission*	governor	.....	8 year term	63 ABARep 425 22 JAJS 199 (note 5)
Minn.	Judicial Council	1942	commission*	governor (supreme ct) ch. justice (all other)	.....	PNCE	26 JAJS 137
Mo.	Missouri Inst. for Adm. of J.	1940	appellate jud. comm.* circuit jud. comm.*	governor	.....	PNCE	24 JAJS 194 (in operation)
Mont.	State Bar Committee	1940	commission*	governor	.....	PNCE	66 ABARep 311
N. J.	Legislative Commission	1941	.....	governor	senate	reappointment	26 JAJS 47 (note 6)
N. Y.	Ass'n of the Bar	1915	Non-partisan judicial ballot and automatic renomination				1915 YB 139
	Ass'n of the Bar	1932	.....	governor	senate	not stated	1932 YB 182
	N. Y. Co. Lawyers Ass'n	1915	.....	governor	senate	not stated	pamphlet (note 7)
	Ditto	1938	.....	governor	senate	PNCE	pamphlet May 19, 1938 (note 7)
	N. Y. State Bar Ass'n Committee	1933	.....	governor	senate	not stated	56 NYSBARep 193 (not adopted by association)
	N. Y. State C. of C.	1937	council*	governor	.....	PNCE	pamphlet June 3, 1937 (note 8)
	Short Ballot Org.	1914	governor	election	(one name on judicial ballot to bear governor's recommendation)		pamphlet March, 1914
	City Club	1932	same plan as that of Short Ballot Organization				Pamphlet # 13 January, 1932
	Judicial Laymen's Ass'n	1941	same as Finch plan below except for minor differences in membership of council				pamphlet April, 1941
	Edward R. Finch	1937	Council on Judicial Character and Fitness* to approve candidates before going on ballot				20 ABAJ 144

State	*Sponsor*	*Year*	*Nomination*	*Appointment or Election*	*Confirmation*	*Tenure*	*Remarks*
N. Y. (cont.)	Wendell P. Barker	1938	commission	governor	senate	PNCE	pamphlet April, 1938
	Paul Windels	1938	commission	election		not stated	pamphlet (radio interview, May 9, 1938)
Ohio	Cleveland Bar Ass'n	1933	judicial council	governor	senate	not stated	63 ABARep 417
	Cincinnati Conference	1934	commission (elected)	governor		not stated	63 ABARep 419
	State Bar Ass'n	1936	judicial council*	governor	senate	PNCE	63 ABARep 419 20 JAJS 93 (note 9)
	Cleveland Bar Ass'n	1927	.....	governor (for supreme court) ch. justice supreme ct. (for appellate courts) ch. justice app. ct. (for all others)	senate	six or eight year term	10 JAJS 177
Okla.	governor's committee			governor	supreme ct.	PNCE	63 ABAJ 429
	State Bar Ass'n Com.	1938	A compulsory bar primary from which two candidates are certified to the regular primary; opposite each name on ballot to be shown his grade in an examination of judicial qualifications given by state board of bar examiners.				63 ABAJ 429
Oregon	State Bar Committee	1936	judicial commission*	governor	.....	PNCE	63 ABAJ 429 (note 10)
Penn.	Independent Group of Lawyers	1940	Incumbents renominated by petition of electors, to run without opposing candidates on primary ballot; candidate receiving more than 50 per cent of primary votes is unopposed at final election; space on ballot for "no" votes to retire unwanted incumbents.				65 ABARep 248 (does not require constitutional amendment)
Utah	State Bar	1933 to 1939	commission*	governor	.....	PNCE	63 ABARep 431 64 ABARep 319 66 ABARep 312
Wash.	State Bar	1937	.....	judicial commission*	.....	reappointment	63 ABARep 432
	State Bar	1939	judicial commission	governor	.....	not stated	63 ABARep 432
Wis.	State Bar Committee	1934	council*	governor	.....	PNCE	63 ABARep 433
	State Bar Committee	1938	council*	election or appointment	.....	PNCE	28 WisBAProc 56
Misc.	A. W. Trice	1932	bar primary	election	.....	not stated	16 JAJS 185

State	Sponsor	Year	Nomination	Appointment or Election	Confirmation	Tenure	Remarks
Misc. (cont.)	Harry A. Gordon	1931	Minimum experience at the bar, and a written examination.				14 JAJS 157
	Charles E. Matson	1931	.....	State Commission for Selection and Appointment of of Judges		not stated	14 JAJS 13
	Burke Shartel	1930	.....	chief justice	supreme court	not stated	15 JAJS 23; 28 Mich L Rev. Nos. 5, 6, 7 March-May 1930
	Charles T. McCormick	1936	advisers	ch. justice appointed by governor	.....	PNCE	20 JAJS 40
	American Judicature Society	1915	judicial council	ch. justice	.....	PNCE	11 JAJS 145
	National Municipal League	1941	judicial council*	chief justice	.....	PNCE	26 JAJS 56

TABLE II

STRUCTURE OF PROPOSED JUDICIAL NOMINATING COMMISSIONS

State and Sponsor	Name of Group	Number of Mem.	Membership	Appointed or Elected by	Function
Calif.	Board	3	ch. justice	ex officio	nominate
State Bar			p. j. of dist. court of appeal	"	
			local senator	"	
Calif.	commission	3	ch. justice	"	confirm
Plan in use (1934)			p. j. of dist. court of appeal	"	
			attorney-general	"	
Fla.	council	15	ch. justice	"	nominate
Dade County (1935)			7 lawyers	not stated	
			7 laymen	not stated	
Ill.	commission	5	5 residents of county (no other public office)	appellate court	nominate
Chicago Bar Ass'n (1936)					

State and Sponsor	Name of Group	Number of Mem.	Membership	Appointed or Elected by	Function
Iowa	judiciary commission	7	1 sup. ct. justice	supreme ct.	nominate
District Judges' Ass'n (1937)			1 member Dist. J. Ass'n	dist. judges association	
			3 members state bar	state bar association	
			2 laymen	state executive council	
Mich. State Bar (1938)	judiciary commission	9	1 sup. ct. justice	supreme ct.	nominate
			1 circuit judge	circuit judges	
			1 probate judge	probate judges	
			3 laymen	governor	
			3 lawyers	state bar commissioner	
Minn. Jud. Council (1942)	District Judiciary Nominating Commission	5	3 lawyers	members of bar	nominate
			2 laymen	governor	
			(chairmen of district commissions constitute supreme court nominating commission)		
Mo. Plan now in use (1940)	Appellate Judicial Commission	7	ch. justice	ex officio	nominate
			3 lawyers	bar of each app. district	
			3 laymen one from each appellate district	governor	
	Circuit Judicial Commission	5	p. j. of app. court	ex officio	nominate
			2 laymen	governor	
			2 lawyers	local bar	
Mont. (1940)	commission	5 to 7	senior district judge	ex officio	nominate
			attorney gen.	"	
			speaker of house	"	
			lieut. gov.	"	
			law school dean	"	
			1 local layman) 1 local lawyer)	for trial judges only appointed by rest of commission	

State and Sponsor	Name of Group	Number of Mem.	Membership	Appointed or Elected by	Function
N. Y. Finch (1937)	Council on Judicial Character and Fitness	6 to 9	pres. N. Y. State Bar Ass'n	ex officio	nominate
			pres. grange	"	
			pres. C. of C.	"	
			pres. Fed. of Labor	"	
			1 person	governor	
			1 senator	pres. of senate	
			pres. county bar ass'n	ex officio	for local judgeships only
			pres. appropriate bar federation	"	
			univ. regent	"	
N. Y. C. of C. (1937)	council	5	p. j. of App. Div.	ex officio	nominate
			state senator or assemblyman	"	
			pres. of one local bar ass'n	app. div.	
			1 lawyer	"	
			1 layman	"	
Ohio State Bar Ass'n (1936)	Judicial Council	8	ch. justice	ex officio	nominate
			1 app. judge	ct of app.	
			1 common pleas judge	court of c. p.	
			1 probate j.	probate judges	
			1 municipal judge	municipal judges	
			3 attorneys	governor	
Oregon State Bar Committee (1936)	District Judicial Commission	15	9 laymen	voters	nominate
			6 lawyers	bar	
			(supreme court nominations are to be by the combined district commissions)		
Utah State Bar (1937)	Judicial Commission	5	pres. of senate	ex officio	nominate
			speaker of house	"	
			3 senior members of supreme court	"	

State and Sponsor	*Name of Group*	*Number of Mem.*	*Membership*	*Appointed or Elected by*	*Function*
Utah	Judicial Commission	5	ch. justice	ex officio	nominate
State Bar (1939)			atty. gen.	"	
			pres. state bar	"	
			pres. senate	"	
			speaker of house	"	
Wash.	Judicial Commission	—	governor	ex officio	appoint (1937)
(1937)			board of governors of state bar association	"	nominate (1939)
(1939)			3 laymen	governor	
Wis.	Council	10	ch. justice	ex officio	nominate
(1934)			dean, U. of Wis. law sch.	"	
			dean, Marq. Univ. law schl.	"	
			7 attorneys	board of governors of Wis. Bar Ass'n.	
Wis.	Council	7	Ch. justice	ex officio	nominate
(1938)			4 lawyers	governor	
			2 laymen	"	
Nat'l Municipal League	Judicial Council	11	ch. justice	ex officio	nominate
			3 judges	ch. justice	
(1941)			3 lawyers	governor, on nomination of state bar association	
			3 laymen	governor	
			chairman of judiciary committee of legislature	ex officio	
Charles E. Matson	State Commission for Selection and Appointment of Judges	7	1 commissioner at large and 1 from each of the 6 congressional districts, all elected by popular vote		appoint
(1931)					

Let's Decide Every Case on Its Merits

EDWIN F. WOODLE

"It has always seemed to me most unfortunate that litigants having a valid claim or defense should be prevented from obtaining a decision based upon that claim or defense because of some error of commission or omission upon the part of counsel, or because of some uncertainty regarding the interpretation or application of a rule of practice or procedure."

WHATEVER I HAVE TO SAY is intended for the ears not only of those who are here but also for our members who are not present, and for all of the members of our community.

It is rather hard to expect accomplishments in any field of endeavor without having some objectives toward which at least your efforts can be directed. Therefore, I want to touch briefly on three or four subjects which, it seems to me, are vital not only to members of this Association and to the bar generally, but also to all of our citizens.

The first of these, and the first subject with which lawyers always must be concerned, is the administration of justice. This phrase has become more than a little shopworn these days, not only because it is heard so frequently, but perhaps also because it is used so often by persons having apparently little realization of its meaning.

The very simple and basic fact is that the future security and the future welfare of our entire nation, and of all of the people of this country, rest upon the continued administration of justice as it has existed in America since the creation of our earliest courts. Whatever the political and the economic beliefs of the people may be or become, whether our federal government is or becomes paternalistic and highly centralized, or the contrary, our democratic institutions are secure so long as—but only so long as—justice between man and man and between the people and their government is administered by an independent, responsibile and responsive judiciary, and so long as the people have confidence in the administration of justice.

Because it has seemed to be true for so many years—in fact for so many centuries—lawyers, and judges, who are of course also lawyers, have come to believe that they have a monopoly upon the dispensing of justice, as physicians have been given a recognized monopoly upon ministering to our health.

OUR VANISHING MONOPOLY

It seems that in the past few years, both the lawyers and the courts have awakened to a realization of the fact that they no longer have a monopoly in administering justice. And strangely this situation could not exist were it not for the fact that certain of our courts have readily conceded to others, neither learned nor experienced in the law, an important part of those functions which had always resided exclusively in the courts. I refer, of course, to the tremendous and continuing growth of so-called administrative agencies.

I have no time, certainly, to discuss the enormous increase in the number of these agencies, nor the astonishing acquiescence in their power and authority by many of our courts. I have written briefly about this subject in the past, and hope to continue to do so hereafter. It is enough to say that the administration of justice in this country, as we have known it in our time and as Americans have known it since this country was founded, can not continue if the numerous boards, bureaus and administrative agencies existing today continue to flourish.

We can not have, in this country, two systems of dispensing justice—one administered, as it has been for centuries, impartially equally to the rich and the poor, the black and the white, the weak and the powerful, safeguarded by restrictions and limitations and privileges which have been found to be wise and neces-

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Mr. Woodle is a member of the Cleveland Bar, and president of the Cuyahoga County Bar Association. This was his inauguration address on assuming that office, and is reprinted from the *Ohio Law Reporter*, Oct. 9, 1944, where it appeared under the title, "We Cannot Have Two Systems of Doing Justice."

sary through centuries of experience, and another system administered largely in disregard of our principles of jurisprudence, largely in disregard of the limitations, restrictions and privileges which our courts have found it wise and necessary to observe, administered by clerks and temporary appointees not responsible to the people and adjudicating personal and property rights without control by any courts.

Justice can not stand half free and half enslaved. If it does, the people of this country will live to regret the day. This is not to say that our numerous administrative bodies must be wiped out or made impotent. It does mean, however, that to the extent to which they adjudicate personal and property rights between citizen and citizen and between citizens and their government, these agencies must be made to supplement and not to supplant our courts.

This is by way of introduction to the second point I desire to make.

DECREASE OF CONFIDENCE IN COURTS

The growth of these administrative agencies has been due, in a large measure to a decrease of confidence in the administration of justice by the courts. If the lawyers and the judges refuse to recognize this fact, it is only because they are blind who will not see.

If we recognize and accept our own responsibility for the creation and increase of administrative agencies, we can ourselves do much to prevent their spread into other and larger fields. If lawyers have acquired a reputation for being more proficient in argument than in action, it is largely their own fault. I purpose, therefore, that we not merely talk but act, and act promptly.

We congratulate ourselves that here in Ohio we have always been in the forefront of all the states in our system of court procedure. We were among the first to abandon the old rules of common law pleading and to adopt a system of pleading governed by statutory rules which is now almost universal throughout the country.

We were one of the first states to adopt a system of appellate procedure which we thought, at the time of its adoption, was both simple and simplified. I submit to you, however, that these reforms are no longer sufficient. Far too many cases in our courts are never disposed of on the merits. A vast number of cases are determined upon technical and obscure points of practice and procedure—and when I say a vast number, I mean exactly that.

RULES OF PLEADING ARE TOO TECHNICAL

Our rules relating to pleading, to practice and to appeals, both as announced by our courts and as defined by our statutes are too technical, too complex and too uncertain to satisfy the demands of the people today for prompt and efficient administration of justice in our courts. I hope that you will accept that statement as seriously as I intend it, and having accepted it, decide that the situation calls for some prompt action—for I am convinced that this situation has very largely resulted in undermining the confidence of the public in our courts and in the speedy and effective administration of justice there.

I am naive enough to believe that a very simple remedy will assist very materially in altering this very unfortunate state of affairs. A great deal of our present difficulty is due to a lack of simplicity—simplicity of practice, of procedure, of rules and regulations.

It should be, and I assume that it is, the desire of every lawyer and every litigant who asserts or defends a claim in court to have that claim disposed of upon its merits. There are, and there always will be, certain situations under which claims can be asserted or defended on the basis of what a layman may regard as a technicality—the creation or the destruction of a right of action upon some basis which is entirely beyond the scope of this discussion. But it can only serve to bring the law and the courts into disrepute if we, as lawyers, fail to take every step that may be necessary to eliminate the hazards resulting purely from the procedural aspects of the law.

WHY NOT DECIDE ALL CASES ON THE MERITS?

I have some suggestions, therefore, which I desire to submit. They may even be regarded as revolutionary, but they are not revolutionary in themselves. They can only be regarded as such because they require, in many instances, a complete reversal of the attitude of both lawyers and judges to the trial of lawsuits.

If it is the ultimate object of lawyers, litigants and judges to dispose of cases on their merits, why not make certain that this is done

in every case—I say in every case, regardless of any errors of either practice or procedure that may intervene?

If the members of the bench and bar, to whom this subject must primarily be addressed, find any difficulty in admitting its validity, then I suggest simply that the merit of the proposal rests in the fact that it will materially advance and completely effectuate the purpose of our entire judicial system.

Is there anything in fact that is revolutionary in the idea that no matter how many errors of omission or commission a lawyer may make in the drawing or filing of pleadings, in complying with the rules of our various courts, or fulfilling numerous procedural requirements in connection with the handling of litigation, none of these should ultimately destroy the right of each litigant to have the courts hear and determine his claims or his defense upon the merits and dispose of the case upon the merits alone?

This objective could be accomplished in any one of several ways. I suggest that the most effective way is again the simplest and the most direct—the enactment of a statute which will cut across the lines of all procedural problems, as for example the following:

"In any case in which a petition states a cause of action, or in which an answer states a defense, no final judgment determining any issue raised by the pleadings shall be rendered except such as will dispose of the cause upon the merits of such issue, providing, however, that either party may consent to a disposition of the cause upon any ground in favor of the other."

A similar provision could be enacted to cover the hearing of appeals, as, for example—

"No appeal which has been filed within the time allowed by law shall be finally disposed of except upon the merits, providing that either party may consent to a disposition of the appeal upon any ground in favor of the other."

If it be objected that these suggestions would destroy completely the effect of our various statutes relating to requirements of pleading, practice and procedure, my answer is that this result would not necessarily follow. What would follow would be to place the blame for failure to observe the requirements of the law squarely upon the shoulders of the lawyers. It has always seemed to me most unfortunate that litigants having a valid claim or defense should be prevented from obtaining a decision based upon that claim or defense because of some error of commission or omission upon the part of counsel, or because of some uncertainty regarding the interpretation or application of a rule of practice or procedure.

Lawyers make no claim to perfection, and, except in rare instances, lawyers exert their best efforts to promote the causes of their clients. An excellent illustration of how those efforts are frequently thwarted, through no fault of the lawyers, is to be found in the number of cases decided by our appellate courts in recent years turning upon ambiguous, uncertain and frequently absurd provisions of our appellate procedure act.

PUNISH THE LAWYER, NOT THE LITIGANT

It is difficult to understand why the litigants should suffer because lawyers and judges cannot agree as to the meaning or the application of various rules of practice and procedure. If these rules are clear and unambiguous and the omission to obey them is wilful or without reasonable excuse, then some form of penalty should be visited upon the lawyers, but certainly no penalty should be suffered by the litigants.

I suggest that it is high time that some simple and direct remedies of this nature be put into effect by the lawyers themselves, and that the results of employing such remedies will be of immense benefit to the community, and, as a consequence, to the bar.

In considering the attitude of the public toward the courts, the average man's dread of losing his case upon some technicality cannot be overestimated. By the same token, his admiration for the disposition of matters by the various administrative agencies without such supposed technicalities should not be underestimated. And it is difficult for the average member of the public to realize what he stands to lose as a result of the continuous action of such agencies based upon ex parte investigations, improper and insufficient factual basis for their action, and insistence upon conforming their action to accomplish certain announced policies.

In the face of this situation, any steps taken by the bar to assure the people that a case which has any semblance of merit will be de-

cided upon its merits when taken to court will be a long step forward toward restoring to the courts that confidence upon the part of the public which they deserve and must have.

So long as the present situation continues, lawyers may well hesitate to explain to the public how and why our administration of justice functions as it does. Once we have made certain that no pitfalls of practice or procedure will prevent the disposition of a case upon its merits, the time will have arrived to see to it that the administration of the law and the operation of our courts are clearly understood by everyone. A common trait of human nature is an instinctive d i s l i k e — sometime amounting even to fear—of that which is unknown or not understood. This characteristic has operated to the detriment of the bar, and by the same token to the detriment of the public, since it has in many instances prevented persons from seeking legal advice or relief at the hands of the law when that relief would have been readily forthcoming.

There is no mystery or flummery about the administration of justice. We were taught in law school that the law is the epitome of common sense. Sometimes we have found occasion to doubt this assertion. The fact is that the more accurate it becomes the better is the administration of justice.

Letters to the Editor

What Must Be Done to Achieve Uniformity in Canons of Ethics

To the Editor:

Mr. Park, secretary of the State Bar of Texas, has pointed out the undesirable lack of uniformity in the canons of professional ethics applicable to lawyers in the various states. Mainly he has stressed the difference in the canons in force in Texas and those of the American Bar Association. The problem is much deeper and more confusing.

No one has undertaken the difficult task of making available data showing what provisions of the A. B. A. canons have been adopted in each of the several states; nor is it likely that adoption or approval in the states has kept pace with the amendments made from time to time in the A. B. A. canons. Probably very few of these amendments (particularly several relating to Canon 27) were automaticaly adopted or approved in the states.

In the forthcoming book on bar integration which the Society is sponsoring, I have made a comparative study of the canons in effect in the integrated bar states and of the A. B. A. canons. Thus will become available a checkup in such states, disclosing what the variances are and what is required to make the desired uniformity.

GEORGE E. BRAND

Detroit, Mich.

Pittsburgh Pre-Trial Post-Mortem

To the Editor:

Why do judges hesitate in adopting pre-trial techniques? This question was asked in the August issue of the JOURNAL. The experience we have had in Allegheny County, Pennsylvania, may provide an answer.

Allegheny County was the first place in Pennsylvania in which pre-trials were adopted in the Common Pleas courts. In 1941 our dockets were congested and cases were not tried until two or three years after they were placed at issue. In that year a pre-trial list was prepared and each case came up before Judge Wm. H. McNaugher who presided in the pre-trial court throughout the year. Hearings were held in open court. The judge examined the pleadings and with the help of counsel formulated the issues to be tried. The parties agreed to such facts as they could and exhibits were marked and identified. The judge frequently suggested settlement and many cases were settled.

At one of these pre-trial sessions I talked with an attorney who represents insurance companies in tort actions. He said that every one of his cases had been settled, and to my inquiry as to whether it has cost the insurance company more or less than it would normally have had to pay if the cases were tried.

he promptly answered that it had cost the insurance company less. He added, however, that he had earned less as a result of the settlement of so many cases.

The result of pre-trials that year was definitely a success and the docket was substantially improved. The following year another judge was assigned to pre-trials and since that time each year a different judge has taken over this work. As the years have gone by pre-trials have become less and less effective.

The fault lies with the lawyers as well as the judges, and particularly with the absence of pre-trial disclosure procedures under our practice in Pennsylvania. The attitude of the judges is perhaps best described as one of complaisant tolerance toward a modern tool, the efficiency of which is still doubtful.

At the pre-trials no effort is made to analyze preliminary questions of law. No serious attempt is made to simplify and shorten the trial, nor is much opportunity afforded for the settlement of cases. Indeed our pre-trial lists contain 50 cases a day and one judge is expected to pretry all the cases. The pre-trial consists of marking exhibits and fixing a date for trial.

But the lawyers are far more to blame than the judges. The real difficulty lies in their unwillingness to cooperate in the disclosure of facts. The surprise attack which was so deplored when made upon Pearl Harbor is still a weapon which the lawyer anxiously retains. Many lawyers are unwilling to produce for identification releases or statements made by witnesses at the time of an accident. They cherish the prospect of crushing the opposition at the trial by a dramatic flourish of a secret weapon.

In the trial of a case in which I represented the plaintiff, the defense produced a written statement made by my principal witness shortly after the accident. This paper had not been identified at pre-trial, although our pre-trial rules specifically provide for penalties for failure to identify all exhibits. When I objected, the judge without a moment's hesitation said that the production of such a paper at pre-trial would disclose the defense and put it at a disadvantage. This prospect was abhorrent both to him and to my opponent.

This brings us to a struggle which every lawyer must ultimately have with himself in considering the need for pre-trial disclosures. How far is he ready to disclose facts to the other side? If a lawyer knows of a witness whose testimony would be antagonistic to his case, must the lawyer disclose this fact to his opponent and thus put in his opponent's hands information which will help his opponent to win? This is a difficult moral question. As long as lawyers are advocates and as long as their reputations depend upon the number of cases which they win, they will hesitate to disclose more than they have to.

But perhaps there is a line, albeit a tenuous one, that can be drawn between what should properly be disclosed to the other side and what need not be disclosed. If a lawyer learns of a witness whose testimony would be antagonistic to his case, his opponent should not have the means of eliciting this information from the lawyer. But there is no reason why a client or any third person should not be called upon by deposition or interrogatory to reveal the name of this witness to the opposition. Much as we all want to win cases, we must come to the realization that the administration of justice requires a frank disclosure of all the facts which bear upon the issues. This does not mean that work done by one lawyer in the preparation of his case should be available to the other side, but it does mean that the other side should have the opportunity to examine facts and interrogate persons who have information which is material to the issues which will be submitted to the court or jury.

Because of the unwillingness of lawyers to produce papers and photographs which might give the other side too much information, lawyers in our courts have produced less and less papers as the years have gone by, and have made less and less attempts either at limiting the issues or at effecting settlements.

But quite apart from the listlessness of the judges and the chariness of the lawyers, our pre-trials are fundamentally ineffective because we do not have the tools for pre-trial discovery.

In Pennsylvania we cannot take depositions of witnesses before trial unless they are aged, infirm or going; we cannot have discovery of documents except by filing a bill of discovery, a cumbersome procedure which is seldom used; we cannot compel admissions of fact and we cannot submit interrogatories except to witnesses outside the commonwealth. We are thus

handicapped in making an efficient use of pre-trial.

In techniques for pretrial disclosure we are not much farther advanced than the courts were in Sir William Blackstone's time. One hundred and seventy years ago he wrote that one of the defects of the English system was "the want of a compulsive power for the production of books and papers belonging to the parties." He thought there ought to be some original power for the examination of the day-book of a trader. But this good advice has been ignored these many years in Pennsylvania practice.

My own conception of pre-trial is a consultation between the judge and the lawyers on each side with a view to clearing away all preliminary objections to pleadings and jurisdiction, raising questions of law, admitting undisputed facts, making discovery of disputed facts and finally marking out the line of combat.

Until we obtain more modern and effective techniques, pre-trials in Pennsylvania will not achieve any realistic benefits. There are, of course, what Milton called the "flowing fees" and what our friends at the patent bar solemnly refer to as the "per diem." But these are not enough; we want vigorous tools to enable us to fashion a lawsuit into an efficient vehicle for achievement of justice.

ELLA · GRAUBART

Pittsburgh, Pa.

Current Literature—A New Book on Selection of Judges

BOOKS

Selection and Tenure of Judges, by Evan Haynes. Judicial Administration Series. National Conference of Judicial Councils, 744 Broad St., Newark 2, N. J., 1944. 308 pp.

Mr. Haynes has produced a valuable book. It is full of information, replete with citation, and last, but by no means least, readably written. The author does not assume the role of advocate; he describes the problem, presents the facts, mentions the more important proposals advanced as possible remedies, and leaves the reader to draw his own conclusion. If any criticism could be made of the work, it is that there is no judgment rendered. It might have been more satisfying if a definite proposal had been championed. However, the work is well worth serious study, and ought to contribute materially to the solution of an age-old problem.

The keynote of the book is the truism that the quality of justice depends more on the quality of the judge than upon the content of the law. Mr. Haynes, while remarking that the trouble is one of degree and that "even the most cynical must admit that some of the devices for selecting judges now in use are worse than others," is optimistic enough to hope that better means of selection may be found.

Past experience may serve the two-fold purpose of guiding to the desired objective, and of avoiding the pitfalls into which others have fallen. This book lays before the reader the various systems for selecting judges, not only those now in effect, but also those previously tried. This review includes detailed information as to judicial selection in each of the several states, the United States, the contemporary English system, as well as a comprehensive review of former English practices, and the methods now obtaining in continental Europe.

All impartial and intelligent persons agree that judges should be selected by a person or body capable of making the best choice. Divergence of thought proceeds from different views as to the repository of this selective power. Traditionally in common law jurisdictions judges were appointed, usually subject to a veto power vested in some legislative or advisory body. What is described as "The Democratic Revolution in America, 1830-1850," changed this method in many states and substituted popular election. A parallel development was legislative selection, thus translating the veto (confirmation) power into a positive (elective) authority. A majority of states now elect their judges by popular vote, a few appoint in the historical manner, as of course does the federal government, and four elect by joint legislative vote.

The question of tenure is also treated. One opinion proposes short terms of office in order to make the judges more responsive to popular sentiment, the other extreme advocates long or life tenure so that the judges may be indepen-

dent of the government and unintimidated by popular clamor. Between these extremes are moderately and fairly long terms.

One of the most interesting chapters is that dealing with the question of whether decisions involving social policies. It is pointed terms are more liberal than those by appointed judges or judges elected for long terms. No hard and fast rule can be laid down. Examples are cited of reactionary decisions by short term elected judges, and of advanced opinions by appointed judges with long tenure. Judicial statistics do not bear out the proposition that popular election is essential to liberal decisions involving social policies. It is pointed out that the number of such cases is negligible as compared with the total judicial business. These infrequent instances have been magnified with resulting distortion and over-weighing of such issues. The whole system of judicial selection and tenure should not be controlled by a factor of only infrequent occurrence.

In natural sequence, the work reviews the several retirement plans now in force, and mentions the advantages to be expected from adequate retirement provisions. The author takes a positive stand on this question and marshals his argument to a logical conclusion.

The last portion of the book deals with various proposals advanced to remedy the present acknowledged insufficiencies in the method of judicial selection. Ten plans are reviewed and reference is made to many modern articles and addresses dealing with this subject. Here, as elsewhere, Mr. Haynes gives the reader the benefit of much painstaking and effective labor. Most of the discussions are found in more or less "fugitive publications," such as Bar Association Reports, Law Journals and the like, and the book directs the investigator to this source material.

No review would be complete without a reference to the excellent introduction by Dean Pound. If Mr. Haynes is not a protagonist, the Dean is, and with his well-known faculty for incisive statement and powerful presentation, he leaves no doubt as to his position. The foundation of freedom is a government of Law, not of laws: "Law is the arch enemy of autocracy." Reference is made to the outstanding records of judges with long experience and the conclusion reached that judicial experience not only begets judicial facility, but in many instances transforms a mediocre judge into an excellent jurist. Dean Pound aptly rephrases the old adage anent the relative value of precaution and cure by saying:

"Too much thought has been given to the matter of getting less qualified men off the bench. The real remedy is not to put them on."
—Stuart B. Campbell, Wytheville, Va., Chairman, American Bar Association Special Committee on Judicial Selection and Tenure.

Questioned Document Problems, by Albert S. Osborn and Albert D. Osborn. Albany, N. Y.: Boyd Printing Co., 1944. 486 pp.

The author's introduction states, "There are two main questioned document problems discussed in this book. The first of these is the determination of the fact as to whether or not a document is genuine, and the second is the proof of this fact in court."

It is with respect to the second of these problems that this book commends itself to the readers of the JOURNAL. Mr. Albert S. Osborn, the senior co-author, is a layman who knows more about the law and the courts than many lawyers. Well known to the profession are his *Questioned Documents* (1910, revised 1929), *The Problem of Proof* (1922) and *The Mind of the Juror* (1937). In advising the questioned document examiner, the lawyer and the client regarding proof of a document's genuineness or lack of it in court, Mr. Osborn ventures to comment broadly on courtroom practices and the administration of justice from the unique vantage point of a man who has spent a lifetime neither at the bar nor on the bench but in the witness box.

Such another layman's viewpoint was presented in the JOURNAL, last February (27:134) in the article "Making the Record" taken from the National Shorthand Reporters Association. To the many readers who commented favorably on that article we would say that the Osborns' book is almost a whole volume of just such practical advice as was there given. The following titles of especially recommended chapters will indicate the nature of this material:

"Photographs as Court Exhibits," "Continuous Testimony," "Cooperation of Attorney and Expert Witness," "Psychology in Court," "General Impressions or Atmosphere in Court,"

"Cross Examination," "The Law, the Jury and Justice," "New Jersey Juries," "Examination of Prospective Jurors," "The Layman Looks at the Law in Many Courts," "A New Profession —A Tribute to Dean John Henry Wigmore," and "Learning the Law and Learning to Be a Lawyer."

Incidentally, whether or not the reader is interested in questioned documents as such, he is sure to find the several test problems on disputed handwriting and the like, complete with answers in the back of the book, more fascinating than crossword puzzles, detective stories, or other diversions popularly indulged in by the great and learned in their lighter moments.

Survey of the Minor Judiciary in Pennsylvania, by William W. Litke. State College, Pa.: The Pennsylvania Municipal Publications Service, 1942. Paper, 226 pp.

This book is the result of a study begun in 1940 by the Committee on Minor Judiciary of the Pennsylvania Bar Association in cooperation with the Institute of Local Government of the Pennsylvania State College.

It opens with a history of the justice of the peace in England and in Pennsylvania, followed by a detailed description of the present Pennsylvania system, including the number of justices permitted, elected and commissioned, their ages, occupations and length of service, an extended examination of the public cost of the justices, the work they do, and the arrangements for fiscal control over them. Then follows a comparison of the situation in other states, reform proposals advanced and tried out elsewhere, and a discussion of various reform proposals for Pennsylvania. The entire second half of the book is devoted to statistical tables, biblography and index.

The office of justice of the peace being a constitutional one in Pennsylvania, it cannot be readily abolished, if at all. Many statutory improvements are suggested, however. The jurisdiction of the justices, both territorial and otherwise, is in control of the legislature, and it would be possible by statute to enlarge the districts from which they are elected and reduce the number per district, to reduce their jurisdiction to the hearing of insignificant cases, and to set up small claims courts alongside them which would by force of competition take practically all of the business.

This is the most thorough study of justices of the peace that has come to our attention. Although primarily concerned with one state, most of it is intensely pertinent to the study of similar problems in other states. It is unfortunate that its publication in book form, made necessary by its length, precludes its having as wide a circulation as it deserves.

A Handbook for Petit Jurors serving in the District Courts of the United States. Prepared by a committee of United States district judges headed by Judge John C. Knox of New York, and published by order of the Judicial Conference of Senior Circuit Judges. Washington: U. S. Government Printing Office, 1944. 33 pp.

By the very nature of the jury system jurors will always be inexperienced and unfamiliar with legal matters. They are not incapable of learning by experience, but once they have acquired courtroom experience the mathematical chances of their returning a second time to take advantage of it are slight indeed. What they cannot learn for themselves, therefore, they must be told.

In charging the jury, judges do the best they can to provide the jurors with the information they need to do their work properly. There is much they need to know, however, before the judge gets around to charging them and which the judge does not have time to say. This booklet was written to give the jurors a chance to understand courtroom proceedings and their part in them from the start of the trial.

In simple, non-technical language it sets forth the importance of jury service, describes the court system, and then follows the various steps through the trial of a case from *voir dire* examination and oath of jurors through the opening statements, examination of witnesses, argument and charge to the jury, in each instance with helpful suggestions to the jurors. There are separate sections dealing with criminal cases, courtroom etiquette, conduct of the jury during trial, and some most practical pointers regarding deliberations in the jury room. Words and phrases apt to puzzle the jurors are defined and explained.

In addition to facilitating the trial of federal jury cases, this booklet should circulate widely as a pattern for similar booklets for state

courts. Some little revision would be necessary to adapt it to such use, but the bulk of the work has been done, and a booklet such as this in the hands of every juror in the country would do wonders toward correcting many of the evils of which the critics of the jury system complain.

Requests for sample copies should be directed to the Administrative Office of the United States Courts, Supreme Court Building, Washington 13, D. C.

We the People, by Nathan Boone Williams. Published by the author, 1010 Vermont Ave., Washington 5, D. C. 165 pp.

A discussion of the general purposes of the American government as set forth in the preamble to the constitution of the United States, and of the progress of the American people toward attaining them.

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Judicial councils. Maynard E. Pirsig. 4 Federal Rules Decisions 22-28 (Sep., 1944).

Miscellaneous

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New Solution to Minor Court Problem Proposed in Ohio

A NEW APPROACH to the minor court problem involving the retention of justices of the peace subject to the supervision and control of a division of small claims and minor offenses in the courts of common pleas, is contained in a bill prepared by a committee of the Ohio State Bar Association, headed by Henry G. Binns of Columbus. Its text appears in 17 *Ohio Bar Association Report* 362-374 (Oct. 23, 1944).

The bill has been summarized by *Court and Commercial News Syndicate* as follows:

"The committee provides for the creation of small claims divisions in the common pleas courts, with civil jurisdiction up to $300 and criminal jurisdiction in misdemeanor cases. This court could be conducted by a commissioner when the common pleas judge or judges were otherwise engaged. Presumably it would attract most of the business now going to magistrates' courts.

"Most novel feature in the bill is that which gives the small claims judge authority to increase or decrease the number of justices of the peace as he deems the public interest to require, to combine townships for the purpose of increasing the territorial district served by a justice, and, in communities which have no municipal courts, to declare such a community to constitute a particular magistrate's district.

"The better to keep his finger on the situation and to raise the quality of justice in the magistrates' courts, the small claims judge is directed to call a judicial conference once a year. This conference would be made up of all the magistrates in the county.

"The proposed law provides that when either party in a civil case demands a jury trial in a justice's court, or such a trial is demanded by defendant in a criminal proceeding before a justice or mayor's court, the case must be certified to the small claims court and there tried as though it had been originally instituted in that court.

"The small claims judge would discharge for the justice's courts one of the functions now handled for the federal court system by the Administrative Office of the United States Courts—the purchase of books, supplies, equipment and furniture."

1945 Ross Essay Contest Announced

"The development of the doctrine of *stare decisis* and the extent to which it should be applied" is the subject of the 1945 Ross essay contest announced by the American Bar Association.

The contest is held under the terms of a bequest of the late Judge Erskine M. Ross, and the prize amounts to three thousand dollars. Essays are restricted to five thousand words, excluding footnotes and documentation, which, however, must not be excessive. "Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration."

Entries are limited to members of the American Bar Association, and essays must be submitted on or before March 15, 1945. Applications for entry should be sent to the executive secretary of the American Bar Association, 1140 N. Dearborn St., Chicago 10, Ill.

Colorado Bar Association's Program

The Colorado Bar Association hopes to become "a moral factor in the establishment of a non-political judiciary" in that state, as a result of a resolution passed at its annual meeting in October. The president is to appoint a committee to study the possibilities and report a plan or alternative plans in time for discussion and action at the 1945 meeting.

The convention also approved committee reports urging the continuation of an expanding traffic court improvement program and continuation of efforts to secure an integrated bar. Already under way are a thorough study of the code of evidence and an extensive program to bring about a revision of the Colorado rules of criminal procedure.

New Jersey Constitutional Reform Fails

The proposed revision of the New Jersey constitution referred to frequently in recent numbers of this JOURNAL in connection with its judiciary article, was defeated in the November election. The new constitution had the vigorous opposition of certain groups whose power would be diminished or nullified under the new set-up, and their campaigning against it was effective if not on a high level.

Such an effort is not all loss, however, even

when defeated, for the public had an excellent opportunity to learn and think about the problems of government, and it might be added that few reforms of so great a scope have ever succeeded without one or more set-backs. In the meantime, the rest of the country is indebted to New Jersey for having sketched the pattern for a modern and highly efficient state court system which will influence for good the thinking of judicial reform leaders in other states even though it failed of adoption in New Jersey.

A. B. A. Radio Program Goes on the Air

"Let's Face the Issue," nation-wide broadcast of the American Bar Association, made its initial appearance Sunday, Nov. 26, at 5:00 p.m., over 170 stations of the Mutual network. The subject of the first broadcast was the problem of how best to reconvert war production facilities to peacetime uses after the war. Divergent views were expressed by two prominent law authorities, after which the two were "cross examined" by Benjamin Wham and George I. Haight, Chicago lawyers, the whole under the direction of Leland Rex Robinson, moderator.

The program will continue for thirteen weeks, each week taking up some problem of public importance. The subject announced for December 8 was the proposed amendment of the treaty-making power to provide for ratification by a simple majority of both houses of Congress instead of a two-thirds vote of the Senate.

William Doll, Milwaukee, chairman of the Association's public relations committee, is in charge of the program arrangements. The series is being financed as a public service by the Chesapeake and Ohio Railway Company.

Missouri Bar Open for Business

The first executive director of the newly-integrated Missouri Bar will be Harry S. Rooks, St. Louis attorney and former editor of the Missouri Bar Journal, it was decided at a recent meeting of the board of governors. The organization will open a permanent office at 223½ E. High St., Jefferson City, and will begin publication of a new state bar journal next month.

Oklahoma Ponders Judicial Selection

Active steps toward improvement in the method of selecting Oklahoma judges were taken at the annual meeting of the Oklahoma Bar Association last month when the House of Delegates approved a "Non-Partisan Court Plan" and directed the appointment of a committee to investigate this and other possibilities for improving the administration of justice.

Other resolutions called for appointment of a legislative committee to prepare and promote such legislation or constitutional amendment as may be necessary to make women eligible for jury service, and recommended that the time limit for appeals to the supreme court be reduced to ninety days.

News Paragraphs

A post card poll on bar integration accompanied the November issue of *West Virginia Bar News*, sent to all lawyers in the state. The state bar association plans to introduce in the 1945 legislature the same bill that was passed and vetoed two years ago.

An international bar association on a world-wide scale has been proposed by the Section of International Law of the American Bar Association, and a special committee now considering the subject will report at the next annual meeting.

Reelection by a large majority was won by every judge "running on his record" under the Missouri non-partisan court plan in the November election. Among those returned to office were Chief Justice James M. Douglas and Associate Justice Laurance M. Hyde of the Missouri Supreme Court.

The Fifth Annual Tax School, conducted by the Iowa State Bar Association will be held in Des Moines December 14-16, according to an announcement in the November *News Bulletin*. Prominent tax lawyers and representatives of the Internal Revenue Department will lecture and lead discussions on tax law before a group of several hundred Iowa lawyers.

The Norfolk County, Massachusetts, bar recently voted 142 to 8 in favor of unification of the bar, 100 expressing a preference for integration and 49 favoring a federation of local bar organizations.